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CHARLES ELMORE DRIPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

No. **1309** 88

MADGE MESSLER,

Petitioner,

v.

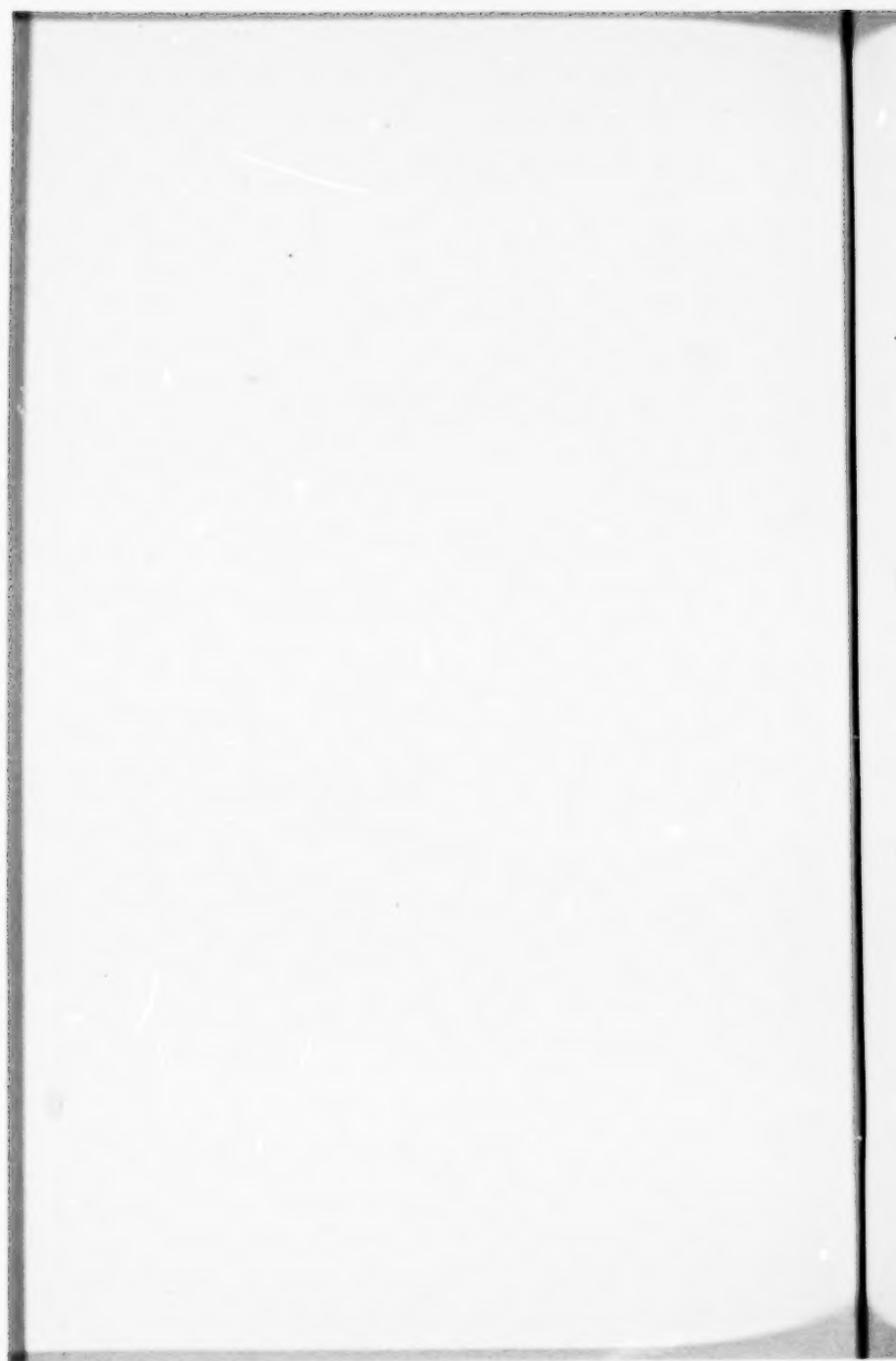
UNITED STATES RUBBER COMPANY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI AND
BRIEF SUPPORTING SAME.**

NATHANIEL FRUCHT,

Attorney for Petitioner.



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UNITED STATES RUBBER COMPANY,
Respondent.

} No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED
STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

Your petitioner, Madge Messler, respectfully prays for
a writ of certiorari to the Circuit Court of Appeals for
the Second Circuit to review the judgment of that Court
entered May 10, 1945.

Short Statement of the Case.

The plaintiff, Madge Messler, is the owner of United
States Reissue Patent No. 18,237, granted October 27,
1931, for a Cushioning Insole for Boots and Shoes, duly
assigned to the plaintiff by Matie C. Messler, the inventor.
The defendant, United States Rubber Company, is a manu-
facturer of articles made wholly or partly of rubber, and
has manufactured and sold shoes which plaintiff contends
are infringements of the Messler patent.

Civil action No. 179 having been brought in the District Court of the United States for the District of Connecticut, and having been duly heard, decision was rendered March 3, 1944, for the defendant. The plaintiff appealed to the Circuit Court of Appeals for the Second Circuit, and the appeal having been duly heard, the decision of the District Court was affirmed May 10, 1945.

Jurisdiction.

This Court has jurisdiction to review the judgment in question under 240-A of the Judicial Code (28 U. S. Code, Sec. 347).

The Grounds for Review.

1. The decision held the reissue patent in suit invalid over United States Patent No. 1,697,589 to Cort, which patent discloses the invention but does not claim it; this reference was before the United States Patent Office, and was duly overcome by an affidavit under Rule 75 of the Patent Office Rules of Practice. No evidence controverting or attacking the affidavit was presented by the defendant. The Court of Appeals held:

“The contention that the self-serving declarations of the affidavit filed in the Patent Office five years after Cort’s application should be given weight as evidence or should shift the burden of proof to the defendant is to say the least, surprising.”

The first ground for review is, that the holding that an affidavit under Rule 75 should not be given weight as evidence and should not shift the burden of proof to the defendant is contrary to the pronouncements of the United States Supreme Court in analogous cases.

2. The decision held that a cited patent which was overcome by an affidavit under Rule 75 was a valid reference.

The second ground for review is, that this decision is contrary to the holdings in similar cases in the Court of Appeals for the Ninth Circuit and the Fourth Circuit.

3. The decision held that the issue of a patent as the result of an affidavit under Rule 75 in no sense was the equivalent of an adjudication of priority.

The third ground for review is, that the holding that an issue of a patent pursuant to filing and acceptance of an affidavit under Rule 75 is in no sense an equivalent of an adjudication of priority, is contrary to the intent of the Revised Statutes, Sec. 483.

4. The decision held that the issue of a patent as the result of an affidavit under Rule 75 does not involve any exercise of discretion by the Patent Office, and results from the mere filing of the affidavit.

The fourth ground for review is, that the issue of a patent under the circumstances stated, does involve the exercise of discretion and judgment by the Patent Office, and is not the result of merely filing the affidavit.

5. The decision held that in a suit which hinges on an affidavit under Rule 75, the allegedly infringing defendant is not required to controvert the truth of the affidavit.

The fifth ground for review is, that an affidavit under Rule 75 which is vital to a case, requires a defendant to controvert the truth of the affidavit.

6. The decision, with respect to the issue of infringement, narrowly construed the claims without considering the substance of the invention and confined the invention to the specific construction described.

The sixth ground for review is, therefore, that the decision is not in accord with rulings of the United States Supreme Court holding infringement where the substance of an invention has been appropriated.

Prayer.

WHEREFORE, your petitioner respectfully prays that the petition be granted.

MADGE MESSLER,
By NATHANIEL FRUCHT,
Attorney for Petitioner.

